Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. 91-453

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court
of the State of South Carolina

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, PROPERTY RIGHTS PRESERVATION ASSOCIATION, INC., AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

January 2, 1992

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE JUST COMPENSATION CLAUSE REQUIRES A COURT IN ALL LAND USE CASES TO IDENTIFY THE PARTICULAR PROPERTY RIGHT AT RISK AND TO WEIGH THE BURDEN PLACED ON IT WITH THE PUBLIC BENEFITS SOUGHT TO BE ACHIEVED BY THE REGULATION. . . . 6

II. JUST COMPENSATION MUST BE PAID TO A LANDOWNER WHENEVER THE GOVERNMENT DENIES THE OWNER AN IMPORTANT PROPERTY RIGHT REGARDLESS OF THE EXTENT OF THE ECONOMIC HARDSHIP SUCH DEPRIVATION CAUSES. 13

A. Petitioner's Plan To Build Homes On His Two Lots Does Not Constitute A Public Nuisance Because The Resultant Injury To The Public Interest Is The Necessary Consequence Of The Cautious And Prudent Exercise By Him Of His Acknowledged Right To Build On His Own Land 14

1. "Harm" that is the necessary consequence of the cautious and prudent exercise

of an acknowledged right does not constitute a public nuisance at common law. 14

2. The right to build a dwelling-house on an individual residential lot is a fundamental property right under common law. 18

B. There Are No "Nuisance Exceptions" To The Operation Of The Just Compensation Clause 20

C. The Character of the Governmental Action In This Case Is Confiscatory In Nature Because It Effectively Ousts The Owner From His Property In A Way That Has Been Customarily Achieved Through Eminent Domain Proceedings. 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 447 U.S. 257 (1980) 5, 11, 17, 23
Armstrong v. United States, 364 U.S. 40 (1960) . 8, 10
Averne Bay Construction Co. v. Thatcher, 15 N.E.2d 587 (N.Y. 1938) 18, 24
Bartemeyer v. State of Iowa, 85 U.S. 129 (1873) . . 21
Board of Regents v. Roth, 408 U.S. 564, 577 (1972) 7
Bostock v. Sams, 52 A. 665 (Md. 1902) 8, 19, 23
Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) 9, 18, 20, 25
Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 26 S.Ct. 341 (1906) 8, 21
City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) 24
Commonwealth ex rel. Kealtor v. Clearview Coal Co., 100 A. 820 (Pa. 1917) 21
Connolly v. Pension Benefit Guar. Corp, 475 U.S. 211 (1986) 5, 11, 12, 28
Curtin v. Benson, 222 U.S. 78 (1911) 8, 19
Eaton v. B. C. & M. R. R, 51 N.H. 504 (1872) . 9, 14
Esposito v. South Carolina Coastal Council, 939 F.2d 165, 173 (4th Cir. 1991) 13, 22
Faucher v. Sherwood, 32 N.W.2d 440 (Mich. 1948) 27
First English Evangelical Lutheran Church v. County of Los Angele, 482 U.S. 304 (1987) 10, 26
Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) 17
Gardner v. Village of Newburg, 2 Johns. Ch. (N.Y.) 162 (1816) 8
Gorieb v. Fox, 274 U.S. 603 (1926) 5
Griggs v. Allegheny County, 369 U.S. 84 (1962) . . . 9
Hadacheck v. Sebastian, 239 U.S. 394 (1915) . 12, 27
Helfrich v. Catonsville Water Co., 74 Md. 269 (1891) 17, 19
Hoshour v. County of Contra Costa, 21 Cal. Rptr. 714 (1962) 27

Page

Hudson Water Co. v. McCarter, 209 U.S. 349 (1908) 5
Kaiser Aetna v. United States,
444 U.S. 164 (1979) 8, 10, 23
Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) . . . . . *passim*
Lasala v. Holbrook, 4 Paige (N.Y.), 169 (1833) . . . 14
Lipsitz v. Parr, 164 Md. 222 (1932) 18
Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 8, 10
Loveladies Harbor, Inc. v. United States, 21 Cl. Ct.
153 (1990) 13
Loveladies Harbor, Inc. v. United States, 15 Cl. Ct.
381 (1990) 13
Lucas v. South Carolina Coastal Council,
404 S.E.2d 895 (S.C. 1991) . . . . . *passim*
McDougal v. County of Imperial,
942 F.2d 668 (9th Cir.1991) 25
Miller v. Schoene, 276 U.S. 272 (1928) 22
Moale v. Baltimore, 5 Md. 314 (1854) 7, 9
Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) 10
Moore v. City of East Cleveland, 97 S.Ct.
1932 (1977) 8, 19, 28
*Morris County Land I. Co. v. Parsippany-Troy
Hills Tp.*, 193 A.2d 232 (N.J. 1963) 24, 25
Mugler v. Kansas, 123 U.S. 623 (1887) . . . . . *passim*
Nectow v. Cambridge, 277 U.S. 183 (1928) 27
Nollan v. California Coastal Commission,
483 U.S. 825 (1987) . . . . . *passim*
Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978) 5, 11, 20, 22, 27
Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) . . . . . *passim*
The People v. Kerr, 37 Barb. (N.Y.) 357 (1862) . . . 9
Prentice v. Geiger, 74 N.Y. 341 (1878) 16, 17
Preseault v. ICC, 494 U.S. 1 (1990) 7
Pumpelly v. Greenbay Company, 80 U.S. 179 (1871)8, 9
Richards v. Washington Terminal Co., 233
U.S. 546 (1914) 9

Page

Rideout v. Knox, 148 Mass. 368 (1889) 18, 19
Rounds v. Mumford, 2 R.I. 154 (1852) 15
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) . 8
Skaw v. United States, 740 F.2d 932 (Fed.
Cir. 1984) 10
Snow v. Parsons, 28 Vt. 459 (1856) 16, 17
United States v. Causby, 328 U.S. 256 (1946) 9
United States v. General Motors Corp.,
323 U.S. 373 (1945) 8
United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 4, 10
United States v. Welch, 217 U.S. 333 (1910) 8
Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 5, 12
Walters v. Baltimore & O.R.R., 88 A. 47 (Md. 1913) 9
Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155, 161 (1980) 7
Welch v. Swasey, 214 U.S. 91 (1909) 5, 17
Whitney Benefits, Inc. v. United States,
926 F.2d 1169 (Fed. Cir. 1991) 11
Willcox v. Penn Mut. Life Ins. Co.,
55 A.2d 521 (Pa. 1947) 8
Wynehamer v. People, 13 N.Y. (3 Kernan)
378 (1856) 8, 9, 21

CONSTITUTION AND STATUTES

U.S. Const., Amend. V . . . . . *passim*
S.C. Const. Art I, § 13 7
Beachfront Management Act,
S.C. Code Ann. sec. 48-39-10 . . . . . *passim*
Emergency Wetlands Resources Act of 1986, 16 U.S.C.
§§ 3921-3923 27
The Recreation Use of Conservation Areas Act of 1962,
as amended, 16 U.S.C. § 460K-1 27
The Land and Water Conservation Fund Act of 1965,
16 U.S.C. § 4601-4-11 27
The National Wildlife Refuge System Administration Act,
26 U.S.C. § 668dd-33 27

Page

The Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715 27
Federal Land Policy and Management Act, 43 U.S.C. § 1748 27

MISCELLANEOUS

Black's Law Dictionary (1968) 14
Magna Carta, arts. 28, 30 & 31 7
Rathkopf, The Law of Zoning and Planning (1991) . 26
Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985) 6
1 The Records of The Federal Convention of 1787, 302 (M. Farrand ed. 1911) 7
6 *The Writings of James Madison* (G. Hunt ed. 1906) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-453

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

---

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, PROPERTY RIGHTS PRESERVATION ASSOCIATION, INC., AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 120,000 members and supporters nationwide.[1] WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable

---

[1]By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

government. WLF has devoted substantial resources to litigating environmental issues including those involving governmental restrictions on the use of wetlands, and has appeared in this and other courts on the application of the Just Compensation Clause of the Fifth Amendment to regulatory measures. *See, e.g., Yee v. Escondido*, No. 90-1947, *cert. granted*, 112 S.Ct. 294 (1991); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Loveladies Harbor, Inc. v. United States*, No. 91-5050, (Fed. Cir. argued Oct. 9, 1991).

The Allied Educational Foundaiton (AEF) is a non-profit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and economics, and has appeared before this Court with WLF in *Yee v. Escondido* and other cases.

The Property Rights Preservation Assocation, Inc. is a non-profit organization organized by beachfront homeowners along the coast of Florida who suddenly find themselves facing the same kind of setback restrictions found in South Carolina's Beachfront Management Act before this Court. While the Florida homeowners currently occupy their homes, the Florida law, as does South Carolina's BMA, prohibits current homeowners from rebuilding or repairing their homes that are seriously damaged by fire or acts of nature, thereby greatly reducing the value of their home and underlying property. The law thus leaves these property owners with a form of a life estate (based on the "life" of the structure) rather than fee simple ownership. They find themselves in the same position as the property owners in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), and will be directly affected by the decision in this case.

The Fairness to Land Owners Committee (FLOC) is a Maryland-based national organization with over 8,000 members who are property owners faced with confiscatory land-use regulations involving wetlands, wildlife refuges, and similar laws. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amici will present a broader perspective of the issues presented in this case which will assist this Court in deciding them in such a way so as to give clear guidance to lower courts in adjudicating not only the clear cases such as this one where the landowner's property was totally taken, but in adjudicating the far more common cases where the government requires the owner to forfeit his right to develop a portion of his land.

STATEMENT OF THE CASE

The petitioner purchased two oceanfront single-family residential lots in Charleston County, South Carolina in 1986 for $975,000 intending to build a home for his family on one lot, and to build a home on the other for resale.

In 1988, South Carolina enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-10 (BMA), to enhance and preserve the beach/dune system, *inter alia*, for "indigenous flora and fauna," *id.* § 2(1)(c), "natural beauty," *id.* § 2(1)(d), "tourism," *id.* § 1(1)(b), and to stem "normal erosion," *id.* § 2(1)(a).[2] In short, South Carolina wishes to promote the general welfare of the state by preserving and enhancing its coastal areas as natural beach parks.

While the law's stated goal is to have a beach management plan to include "a *gradual* retreat [of development] from the [beach/dune] system over a forty-year period," *id.* § 2(2), and to "*discourage* new construction in close proximity to the beach/dune system," *id.* § 1(d)(6) (emphasis added), the means chosen to implement these goals was an immediate and abrupt ban on all permanent construction, including dwellings, within mandated setback lines that totally engulfed petitioner's property. It is undisputed

---

[2] As will be discussed *infra*, the price paid for the lots and the date of the enactment of the BMA are essentially irrelevant in considering whether a taking of the property has occurred in this case.

that the law precluded the reasonable development and economically viable use of petitioner's property.[3]

The trial court found that the law worked a permanent and total loss of the value of Mr. Lucas's property that was tantamount to a taking under both the South Carolina and United States Constitutions, and awarded just compensation. In a 3-2 decision, the Supreme Court of South Carolina reversed, holding that petitioner's proposed plan to build a single-family home on his property that would otherwise meets building code requirements nevertheless constitutes, or is akin to, a public nuisance, and further holding that no compensation is due when government regulations prohibits a property owner from using his property for purportedly nuisance-like activities. 404 S.E. 2d 895, 902 (S.C. 1991). The lower court did not factor in at all the extreme burden that the BMA places on the property rights of the landowner, purporting to rely on this Court's decision in *Keystone v. Bituminous Coal Assoc. v. Debenedictis*, 480 U.S. 470 (1987), and *Mugler v. Kansas*, 123 U.S. 623 (1887), that such analysis is unnecessary for nuisance-like activities. *Id.*

SUMMARY OF ARGUMENT

I. This case deals with one of the most fundamental of all property rights protected by the federal Constitution from being taken without just compensation, the right to build a home on one's own land. It is a right which the State of South Carolina has acknowledged by allowing Mr.

---

[3] While the respondent has noted that petitioner's lots have on occasion "been under water or subject to tidal intrusion" since 1963 (Resp. Opp. Cert. at 1), that fact does not further respondent's argument; if anything, it helps the petitioner. For not only does the BMA prevent petitioner from building on his property, he may even be prevented by other provisions of this law or related ones from taking measures to protect his property from being further flooded. "Indeed, it may be more likely that denying a permit to fill frequently flooded property will prevent economically viable use of the property than denying a permit to fill property that is wet but not flooded." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, n.4 (1985).

Lucas's two residential lots to be created by state law and by allowing Mr. Lucas to purchase them. A complete ban on construction entirely destroying the value of a lot can scarcely be characterized as anything less than a *direct* and *special* invasion of Mr. Lucas's fundamental rights.

While this Court has frequently upheld regulations imposed primarily for health and safety concerns limiting the height of buildings, *Welch v. Swasey*, 214 U.S. 91 (1909); limiting the character of the buildings which may be constructed, *Euclid v. Ambler Realty, 272 U.S. 365 (1926)*; requiring that buildings be set back a reasonable distance from a public street for fire safety reasons, *Gorieb v. Fox*, 274 U.S. 603 (1927); or specifying the lot size, *Agins v. City of Tiburon*, 447 U.S. 225 (1980); a land-use regulation rendering "an ordinary building lot wholly useless," *see Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) --in effect, a 100 percent setback requirement-- has never been upheld by this Court.

That the landowner in this case did not challenge the legislative reasons for the enactment of the law or its validity, does not mean, as the South Carolina Supreme Court erroneously concluded, that the petitioner conceded that *his* building of a home on each of his two lots constitutes a legal public nuisance, is akin to one, or that *Mugler* and its progeny created a nuisance exception to the Fifth Amendment relieving the court of its duty to independently weigh the benefits to society and the burdens placed on the property owner produced by the operation of the law.

Amici submit that building a home on a residential lot is a reasonable use of one's property that cannot be considered a public nuisance, and that a court must always weigh both the benefits and burdens of a land-use restriction to determine whether a taking has occurred.

II. Also crucial to this balancing inquiry and often overlooked or misinterpreted by courts in regulatory takings cases of this type, is the "character of the governmental action," a factor referred to in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). In this case and in the enforcement of similar

environmental federal and state laws, the state is requiring the property owner to, in effect (and in some cases, in fact), dedicate his land as open-space for the benefit of the public. This is tantamount to physically ousting the owner from his property. In doing so, the state has conveniently avoided the customary exercise of its eminent domain power to purchase parks and other similar open spaces for the public benefit.

In short, whereas the California Coastal Commission in *Nollan* was properly characterized by this Court as engaging in an "out-and-out plan of extortion" by demanding that the owners provide a public easement as a condition for rebuilding their home, *Nollan v. California Coastal Comm'n, 483 U.S.* 825, 837 (1987), the South Carolina Coastal Commission in this case has brazenly gone much further and engaged in what could be aptly called an out-and-out plan of confiscation. As *amici* will demonstrate herein, the arguments advanced by South Carolina to preserve its beaches in this way are based on nothing more than the same substance which it desires to protect.

ARGUMENT

I. THE JUST COMPENSATION CLAUSE REQUIRES A COURT IN ALL LAND USE CASES TO IDENTIFY THE PARTICULAR PROPERTY RIGHT AT RISK AND TO WEIGH THE BURDEN PLACED ON IT WITH THE PUBLIC BENEFITS SOUGHT TO BE ACHIEVED BY THE REGULATION.

The Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." This clause was drafted in response to the widespread practice of uncompensated takings by colonial and state legislatures -- a practice rejected by the framers of the Constitution. *See, e.g.*, Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 695 (1985). The concept of just compensation, however, was not invented

by the framers of the Constitution. It may be traced at least as far back as 1215 when the Barons of England exacted from King John the Magna Carta which contains at least three references to this right.[4] It is also deeply rooted in the spirit of the common law.[5] Our Founding Fathers firmly believed that "the '[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property.'" 1 The Records of The Federal Convention of 1787, 302 (M. Farrand ed. 1911). Madison flatly stated that "[g]overnment is instituted to protect property of every sort . . . ." J. Madison, Property, 6 *The Writings of James Madison*, 101 (G. Hunt ed. 1906).

While the Fifth Amendment prohibits the taking of private property for public use without just compensation, the U.S. Constitution does not define what constitutes property. As this Court has repeatedly recognized, "[p]roperty interests. . . are not created by the [United States] Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source" such as state law or the common law. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Preseault v. ICC*, 110 S.Ct. 914, 926 (1990) (O'Connor, J., concurring); *Keystone, supra*, 480 U.S. at 520 (1987) (Rehnquist, C.J., dissenting).

On some occasions, the right or interest has been defined by the statutes of a particular state. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade se-

---

[4] *See* Magna Carta, arts. 28, 30 & 31.

[5] *See Moale v. Baltimore*, 5 Md. 314, 321 (1854). Indeed, South Carolina's Takings Clause appears to be more protective of property rights than the similar federal provision because it requires that property cannot be taken for public use "without just compensation being first made therefor." S.C. Const. Art. I, § 13. This provision suggests that any taking, regulatory or otherwise, is unconstitutional under South Carolina law without first providing compensation, whereas the federal constitution envisions a taking for public use to be a constitutional act so long as just compensation is made afterwards but computed from the time of the taking.

crets); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialman's lien); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (support estate).

At other times, the right has been defined by the English common law. "Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) (right to dwell with the person of one's choice). *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (the right to exclude others); *Curtin v. Benson*, 222 U.S. 78 (1911) (right to pasture livestock); *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 26 S.Ct. 341, 348 (1906) (right to drain land into a riparian stream); *United States v. Welch*, 217 U.S. 333 (1910) (right-of-way); *Gardner v. Village of Newburgh*, 2 Johns. Ch. (N.Y.) 162 (1816) cited in *Pumpelly v. Greenbay Company*, 80 U.S. (13 Wall.) 166, 178 (1871)(right to receive waters from a riparian stream according to their natural flow); *Bostock v. Sams*, 52 A. 665, 668 (Md. 1902) (right to build on one's own land).

Thus, at common law, property is not so much the material thing, as the aggregate of rights which the law annexes to it. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).[6] This Court has affirmed the common law doctrine that certain strands among the bundle of rights are essential attributes of its ownership, without which property itself could not exist. Among these rights is the right to possess, use, and dispose of property, *United States v. General Motors Corp., supra*, as well as the right to exclude others from that use, *Nollan v. California Coastal Commission, supra*.

---

[6] *See also Willcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521, 528 (Pa. 1947); *Wynehamer v. People*, 13 N.Y. (3 Kernan) 378, 433 (1856); and *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 511 (1872).

The right to use and enjoy property --the right affected in this case-- is an essential attribute of its ownership that may be traced back at least as far as Lord Coke who "long ago said, 'What is land but the uses thereof?'" *The People v. Kerr*, 37 Barb. (N.Y.) 357, 399 (1862). "From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property'." *Burrows v. City of Keene*, 432 A.2d 15, 19 (N.H. 1981), *quoting Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 511 (1872). There are, as this Court approvingly noted in *Pumpelly v. Greenbay Company*, 80 U.S. at 179 (1871) "numerous authorities to sustain the doctrine that a serious interruption to the *common and necessary use of property* may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." *Id.* (emphasis added). This may be true not only of governmental actions which physically interfere with the use of property,[7] but also of regulations which deprive the owner the use or value of property.[8]

Amici acknowledge that no bright-line test exists for

---

[7] *See, e.g., Pumpelly v. Green Bay Company, supra; Eaton v. B. C. & M. R. R., supra; United States v. Welch*, 217 U.S. 333 (1910) (by flooding); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (by railroad locomotive smoke); *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (airplane overflights); *Walters v. Baltimore & O.R.R.*, 88 A. 47 (Md. 1913) (by bridge abutment).

[8] *See Nollan, supra; Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); see also Wynehamer v. People*, 13 N.Y. (3 Kernan) 378, 398 (1856): "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretations, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power;" *Moale v. Baltimore*, 5 Md. 321-322: "[W]e regard the act of 1817, which denies to the proprietor the use of his land, as nothing short of an act of confiscation."

determining when a regulatory taking occurs; rather, this Court has traditionally engaged in a balancing test weighing the burdens on the property rights at risk with the public benefits the government wishes to advance.[9] But in order to weigh these interests properly, a court must know and appreciate the *nature* of the property interest at risk. While in some cases, the amount of property may indeed seem small, the nature of the right affected, e.g., the right to exclude, is a property right so fundamental that its slightest diminution constitutes a taking as in *Loretto* and *Kaiser Aetna*.

On the other side of the scale, the Court must examine the nature of the governmental interest to determine what weight to give it. Just because it is within the police power of the state to enact the law, the true purposes of the law must be examined rather than the label attached to it. Thus, rules primarily relating to health and safety are generally given more weight than broader concerns promoting the general public welfare such as one finds in aesthetic and open-space rules.

In this case, the Court must weigh the fundamental property right to build on one's own land on one side the

---

[9] *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the takings clause is designed to "prevent[ ] the public from loading upon one individual more than his just share of the burdens of government"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes desired should fall"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single[ ] out" individuals "to bear the burden of [its] attempt to remedy" public problems) (also citing *Armstrong*, 364 U.S. at 49); *United States v. Riverside Bayview Homes, Inc.*, 747 U.S. 121, 127 n.4 (1985) (denial of a permit to fill wetlands by the Army Corps of Engineers may constitute a taking for which compensation is required); *Skaw v. United States*, 740 F.2d 932, 939 (Fed. Cir. 1984) (heart of takings inquiry is "whether the governmental action is no onerous as to constitute a Fifth Amendment taking").

scale with a general environmental protection law on the other. To assist it in this undertaking, this Court has developed several guidelines.

For example, this Court used a three-part test in *Connolly v. Pension Benefit Guaranty Benefit Corp.*, 475 U.S. 211, 224-25 (1986) to weigh the interests presented there:

> [W]e have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. . . . To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) *"the character of the governmental action."* [*quoting Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (other citations omitted) (emphasis added)].

See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987) (reiterating factors). *Keystone* also referred to another formulation or test for deciding whether the burden on a property owner is so great that the law on its face constitutes a taking:

> [L]and use regulation can effect a taking if it "does not substantially advance legitimate state interest, . . . or denies an owner economically viable use of his land."

Keystone, 480 U.S. at 485 (*quoting Agins v. Tiburon*, 447 U.S. 255, 260 (1980), and *citing Penn Central*, 438 U.S. at 124). *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) (citing numerous cases).

Applying these factors to a continuum of land use restrictions has yielded some results about which one can

make some general, but certainly not conclusive observations. An actual invasion of the property by the government or by other individuals under authority of the government, usually has been to found to constitute a "taking" because of the "character of the governmental action" and the importance of the property right invaded, *i.e.*, the right to exclude others.[10] Zoning ordinances such as that in *Euclid* which restrict the right of the property owner to use his land for certain purposes fall in a grey area and may or may not implicate the Fifth Amendment depending upon the extent of the restriction, the right being asserted, and the reciprocal benefits bestowed on the property owner. Finally, police power regulations regulating uses of one's property that constitute public nuisances have been generally upheld, not because there is a nuisance exception to the Fifth Amendment, but that in the particular case, the benefit to the public in abating the nuisance has outweighed the burden imposed on the individual to cease exercising that particular use of the property. *See, e.g., Hadachek v. Sebastian*, 239 U.S. 394 (1915)(urban brickyard).

The lower court in this case analyzed the issues before it in light of four criteria: the three *Connolly* factors (economic impact, interference with investment backed expectations, and character of the governmental action) and "the nature of the State's interest in the regulation" *citing Keystone*. 404 U.S. at 899.[11] While the lower court did not dispute the fact that petitioner was denied all economically viable use of his land and simply end the case there, it went on to conclude there was no taking by

---

[10] *See* notes 8 and 9, *supra*.

[11] Whether the three *Connolly* factors in an *"as applied"* case relate to the "economic viability" test enunciated in *Agins* for *facial* challenges, or are part of a broader balancing analysis, is largely irrelevant and need not be resolved by this Court. The South Carolina Supreme Court concluded that the two economic *Connolly* factors are automatically met if Lucas can show that he has suffered the greater harm posited in *Agins* (which he did), namely, that he has been deprived of "all economically viable use of his land." 404 S.E.2d at 900, n.3.

making three fundamental errors: (1) the lower court wrongly assumed that building a home on a residential lot is a public nuisance or akin to one; (2) the lower court, based upon its erroneous interpretation of this Court's decision in *Keystone* construing *Mugler*, wrongly believed that there was a "nuisance exception" to the Just Compensation Clause and did not weigh the burden that abating this alleged nuisance would have on the rights of the property owner; and (3) the lower court wrongly assumed that the "character of the governmental action" factor applies only in physical occupation cases and has no application in cases such as this one. *Amici* will in turn address each of these issues in this brief.[12]

II. JUST COMPENSATION MUST BE PAID TO A LANDOWNER WHENEVER THE GOVERNMENT DENIES THE OWNER AN IMPORTANT PROPERTY RIGHT REGARDLESS OF THE EXTENT OF THE

---

[12] While the petitioner clearly satisfied the second prong of the *Agins* test by showing that he was deprived of the economically viable use of his property, he did not and need not have challenged the BMA on the alternative grounds stated in *Agins*, namely that the BMA failed to "substantially advance a legitimate governmental interests." However, that does not mean that Lucas or any other property owner could not succesfully challenge the BMA on those grounds. *But see Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991).

The *Esposito* court dismissed this challenge simply because it found that there was the "essential nexus" referred to in *Nollan*, between the state's interest to preserve the beach and the means chosen. 939 F.2d at 169. Yet as the *Nollan* Court made clear, the nexus requirement is only the beginning of the inquiry. The proposed activity by the owner must also "substantially impede these purposes"; and even if that is demonstrated, a regulatory taking could still be found if the restriction "would interfere so drastically with the [property owner's] use of their property. . . ." *Nollan, 483 U.S.* at 836. *Cf. Loveladies Harbor v. United States*, 21 Cl. Ct. 153, 160 (1990), citing to an earlier opinion in the same case, *Loveladies Harbor v. United States*, 15 Cl. Ct. 381, 388-390 (1988) (requirement that property owner preserve wetlands on his property in natural state does not substantially advance legitimate state interest as a result of weighing c. the benefits and burdens inherent in that test).

ECONOMIC HARDSHIP SUCH DEPRIVATION CAUSES.

A. Petitioner's Plan To Build Homes On His Two Lots Does Not Constitute A Public Nuisance Because The Resultant Injury To The Public Interest Is The Necessary Consequence Of The Cautious And Prudent Exercise By Him Of His Acknowledged Right To Build On His Own Land.

1. "Harm" that is the necessary consequence of the cautious and prudent exercise of an acknowledged right does not constitute a public nuisance at common law.

The maxim *sic utere tuo ut alienum non laedas* (use your property so as not to injure others) cited by the court below, 404 S.E.2d at 899, is one well established at common law but simply begs the question as to what is an injury to others.[13] While damage that is remote (which seems to be the case here) never constitutes a public nuisance, not all proximate injuries constitute nuisances either. *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 527 (1872). The problem is in determining what constitutes a *legal* injury to another. *See Lasala v. Holbrook*, 4 Paige (N.Y.), 169 (1833).

The reasonable use by another person of the other person's own property, *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 527 (1872), or the "cautious and prudent exercise of a lawful right," *Rounds v. Mumford*, 2 R.I. 154, at 162 (1852), does not constitute a public nuisance. As was stated so eloquently a century ago in *Helfrich v. Catonsville Water Co.*:

[13] *See Black's Law Dictionary* at 1551 (1968) (4th ed. rev.)

> The reasonable and proper exercise of acknowledged right by one man, may and often does work annoyance and loss to another; but rights cannot be forfeited for this reason.

74 Md. 269, 276 (1891).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) represents a classic application of this maxim. Echoing the common law maxim that, "The rights of the public in property are to be governed by the same rules of law as the rights of individuals,"[14] Justice Holmes, speaking for this Court, held that public agencies which had been so foolish as to acquire only surface rights to land supported by anthracite coal had no more right to the surface support, a distinct property right recognized under Pennsylvania law and owned by certain coal mines, than private individuals would when contracting under similar circumstances. 260 U.S. at 415.

While an exigency existed that warranted public intervention (certainly of much greater magnitude and immediacy than the gradual and speculative beach erosion in this case), the harm caused by the mining of anthracite coal beneath public schools and streets was the necessary consequence of the mine owners' exercise of its mineral and support rights which the Commonwealth of Pennsylvania had repeatedly acknowledged as valid. Having once sanctioned the severance of the support estate from the surface, the Commonwealth of Pennsylvania could not, without resorting to the power of eminent domain, frustrate the reasonable expectations thus engendered, even if their realization resulted necessarily in serious public harm.

Amici have no doubt that the State of South Carolina's interest in preserving its coastline is a legitimate one, and for the sake of argument, we can assume it so substantial

[14] *Rounds v. Mumford*, 2 R.I. at 162. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415 ("The rights of the public in a street . . . are those that it has paid for.").

as the Commonwealth of Pennsylvania's interest once was in preventing mine subsidence beneath public streets or schools which had acquired only surface rights. Nonetheless, the Kohler Act in *Pennsylvania Coal* was held a taking because the "harm" caused in that case, whether to private persons or communities, was the necessary consequence of the mine owner's exercise of what had been repeatedly acknowledged by the Commonwealth of Pennsylvania to be the mine owner's rights.

In the case at bar, the State of South Carolina has permitted the creation of Mr. Lucas's two residential lots, and it has permitted Mr. Lucas to acquire them in public commerce with the reasonable expectation of constructing two residential dwellings thereupon. While the errors of private individuals or public officials "cannot estop the [State of South Carolina] from exercising its police power to abate activity akin to a public nuisance," *Keystone*, 480 U.S. at 488, it has clearly given rise to certain expectations sufficiently bound up with the notion of property that the State of South Carolina must condemn them and pay for them before it effectively ousts Mr. Lucas from the lots and takes over their management.

Even if a use of property interferes *substantially* with the rights of others, including the public, it will not be declared a common law nuisance if the injury is the necessary consequence of the only beneficial use of the property. *Snow v. Parsons*, 28 Vt. 459 (1856) (impairment of a mill by discharges from a tannery upstream) and *Prentice v. Geiger*, 74 N.Y. 341 (1878) (impairment of a mill by sawdust discharged from a sawmill upstream) are two water pollution cases which illustrate the interrelationship between "nuisance" and "reasonableness" at common law. The reasonableness of the use of a stream when not settled by custom is a question of fact for a jury. *Snow v. Parsons*, 28 Vt. at 462; *Prentice v. Geiger*, 74 N.Y. at 345-46.

Slight inconvenience must be tolerated by the other riparian owners if it affords great benefit to the one. However, if the use of a stream by one riparian owner "essentially impairs," *Snow v. Parsons*, 28 Vt. at 462, or "substantially interfere[s]," *Prentice v. Geiger*, 74 N.Y.

at 345, with the rights of others, the use will be held a nuisance, "*unless it is a thing altogether indispensable to any beneficial use at every point of the stream*," *Snow v. Parsons*, 28 Vt. at 462 (emphasis added). The rule of law in water pollution cases has been aptly stated by *Helfrich v. Catonsville Water Co.*, 71 Md. at 276: "[T]he owner of the land must not lose the beneficial use of it."[15]

While these examples are taken from water pollution cases because of the environmental features of the case at bar, the same common law principles would seem applicable to other classes of nuisances as well. Every activity which detracts from the public interest can in some sense be said to cause "harm" to the general public welfare.[16] However, not every "public harm," even a serious one, constitutes a public nuisance or justifies the destruction of constitutionally protected rights.[17] While this Court has

---

[15]While some uses of property were considered more or less subject to regulation even to the point of extinction, other uses were deemed at common law to be "essential and necessary uses" and "attributes of ownership." Thus, while the use of water for the propelling of machinery was permitted so long as it did not substantially interfere with the rights of others, the use of water for domestic purposes, including the watering of livestock, was absolutely necessary, *Prentice v. Geiger*, 74 N.Y. at 345 (1878), and could not be prohibited even if it rendered the water unsuitable for use by a municipal water company incorporated downstream, *Helfrich v. Catonsville Water Co.*, *supra*.

[16]*See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) ("a moderate and *pro forma* polluter such as Florida Rock does no harm" in its mining operation in contrast to someone who puts toxic waste in drinking water).

[17]It should be clear that the maxim that a taking occurs if a land use regulation "denies an owner economically viable use of his land," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), did not originate with zoning. It was rather, in its origins, a limitation upon the power of government to protect public health and safety. *See, e.g., Welch v. Swasey*, 214 U.S. 91, at 107 (1909) (height restriction justified based on the risk of fire could constitute a taking if it deprived the owner of the profitable use of the land). Rather, it was quickly *applied* to zoning by state courts relying upon this Court's ruling in

(continued...)

frequently applied the maxim *sic utere tuo ut alienum non laedas* to "a misuse or illegal use" of property, it has never allowed this term to be applied to prevent "a legal and essential use, an attribute of its ownership," *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. at 512 (Rehnquist, C.J., dissenting).

2. The right to build a dwelling-house on an individual residential lot is a fundamental property right under common law.

In order for a court to properly weigh the competing private rights and public benefits as it must do even if a use is considered to be a nuisance-like activity (as *amici* will discuss in the following section), it is important to first assign an appropriate weight of the right asserted because not all property rights are of equal weight.

For example, Justice Holmes noted while still sitting on the Supreme Court of Massachusetts, that the right to erect a boundary fence more than 6 feet high for malicious purposes (so-called "spite fences") is more or less an accident of residential property ownership and can be limited. The right to build houses or stores for the same malicious purposes, however, is "an incident of property which cannot be taken away even by legislation." *Rideout v. Knox*, 148 Mass. 368, 372, 374 (1889).[18] Whereas the

---

[17](...continued)
Nectow v. Cambridge, 277 U.S. 183 (1928) and *Pennsylvania Coal Co. v. Mahon*, *supra*. *See Eaton v. Sweeney*,177 N.E. 412 (N.Y. 1931); *Averne Bay Construction Co. v. Thatcher*, 15 N.E.2d 587, 591 (N.Y. 1938); and *Lipsitz v. Parr*, 164 Md. 222, 234 (1932).

[18] While a greater than 6-foot tall spite fence may be regulated, the erection of a 6-foot sea wall to protect one's beach property and home from the vicissitudes of nature (such as the kind used by the property owners in *Nollan*) is also an incident of property ownership, because at common law, the inherent and essential right of all men is the right of "acquiring, possessing, and *protecting* property. . . ." *Burrows v. City of Keene*, 432 A.2d 15, 19 (N.H. 1981)(emphasis added). Accordingly, while the issue is not directly presented in this case, (continued...)

manufacture of beer for consumption as a food is not a right which "inhere[s] in citizenship" as the owner tried to assert in *Mugler v. Kansas*, 123 U.S. 662, the right to cultivate the soil and to pasture one's livestock, *Curtin v. Benson*, *supra*, *Helfrich v. Catonsville Water Co.*, and more pertinently, the right to reasonably build houses or stores on one's own land, *Bostock v. Sams*, *supra*, *Rideout v. Knox*, *supra*, and the right to dwell with the person of one's choice, *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 514 (Stevens, J., concurring), are essential and necessary uses at common law and incidents of property ownership.[19]

The South Carolina Supreme Court seems to have interpreted the very general findings in the Beachfront Management Act as declaring Mr. Lucas's development plans to be a public nuisance, or at least as being closely enough akin to one as to justify the destruction of his property rights. 404 S.E.2d at 896-99. However, the findings of a legislative body are not always decisive. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. *Amici* submit that the construction or the rebuilding of a dwelling-house on an individual residential lot is not a public nuisance at common law, nor does it allow itself to be declared so by legislative enactment. As one court put it:

> Although there may undoubtedly be some uses of the land which are sufficiently injurious to others that their use may be prohibited, the normal

---

[18](...continued)
certain provisions of South Carolina's BMA limiting the use of "armoring in the form of hard erosion control devices such as seawalls. . . to protect erosion-threatened structures [homes] adjacent to the beach," BMA, § 1(5), and the prohibition on the rebuilding of damaged homes are clearly suspect.

[19] *Compare Nollan v. California Coastal Commission*, 483 U.S. 833 n. 3: "But the right to build on one's own property . . . cannot remotely be described as a 'government benefit'."

development of the land for residential purposes is not one of them.

Burrows v. City of Keene, 432 A.2d 15, 21 (N.H. 1981).[20]

B. There Are No "Nuisance Exceptions" To The Operation Of The Just Compensation Clause.

The lower court erroneously concluded that if the legislative purpose of the BMA is to prevent a significant harm to South Carolina's beaches, however remote, then it need not proceed to weigh the burdens placed on the property owner. It did so by misintepreting Keystone's reliance on *Mugler* and its progeny as somehow relieving a court from weighing the private and public interests involved.

While the petitioner and perhaps other *amici* will treat this issue in some depth in their briefs, it is suffice to say here for purposes of our brief that the notion of a "nuisance exception," a rather unfortunate phrase used in the dissents in both *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 146 (1978) (Rehnquist, J., dissenting) and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 513 (Rehnquist, C. J., dissenting), can be properly understood as simply being a short hand method of stating the end result that a court arrives at after weighing both the public benefits and the private burdens in cases involving those kind of activities. Even the majority in *Keystone* did not consider *Mugler* an exception to the operation of the Just Compensation Clause, but merely represented the added and *sometimes* decisive weight that should be placed on the public interest side of the scale.

---

[20] No doubt Mr. Lucas's common law rights have been modified somewhat by this Court's ruling in *Ambler Realty Co. v. Euclid*, 272 U.S. 365 (1926). But Mr. Lucas's property is zoned for residential use, and the lots were created under the subdivision regulations of the State of South Carolina. While zoning laws are restrictions on the use of land, the zoning law here permitting residential use merely affirms the common law right already possessed by the petitioner.

Thus, it was not superfluous as the lower court suggests in this case, 404 S.E.2d at 901, n.4, for the *Keystone* majority to continue its analysis by weighing the private side of the equation by looking at the nature of the right asserted, the severity of the economic impact of the regulation, and the investment backed expectations. *Pennsylvania Coal* should in turn be distinguished from *Mugler* because the former resulted in a direct invasion of an acknowledged right: "'[T]he right to coal consists in the right to mine it.'" *Pennsylvania Coal*, 260 U.S. at 414, quoting *Commonwealth ex rel. Kealtor v. Clearview Coal Co.*, 100 A. at 820 (Pa. 1917).

In any event, the private rights and public benefits present in the so-called "nuisance" cases can easily be distinguished from those that must be weighed here. In light of this Court's decision in *Chicago, B. & Q. R. Co. v. Illinois*, decided after *Mugler*, this Court's decision in *Mugler* should not be interpreted as authorizing the State to "violate rights secured or guaranteed by [the Constitution of the United States]" whenever "providing, by legislation, for the protection of the public health, the public morals, or the public safety." *Mugler v. Kansas*, 123 U.S. at 663.[21] Rather, *Mugler* should be interpreted as holding that the right to manufacture intoxicating liquor is not one which "inhere[s] in citizenship." *Mugler v. Kansas*, 123 U.S. at 662.

Clearly, the fundamental right to build a home on one's property is significantly more weighty than the right to manufacture intoxicating beverages. Furthermore, the property owner in *Mugler*, unlike petitioner here, could still use his land for innumerable other lawful uses. Indeed, he could use his brewery equipment to manufacture non-alcoholic beer, or export the equipment and sell

---

[21] Already, some 14 years before *Mugler*, this Court recognized within the context of a prohibition on the sale of intoxicating drinks, that a regulation validly enacted for the protection of the public health and safety could operate so rigidly upon property in existence at the time of its passage as to amount to a taking. *Bartemeyer v. State of Iowa*, 85 U.S. 129, 133 (1873), citing *Wynehamer v. People, 13 N.Y.* 378 (185[illegible]).

it to someone in a state that allows such activity. Mr. Lucas cannot move his beachfront lots, nor has he even been given any transferable development rights as was the property owner in *Penn Central*. *Amici* submit that these factors alone are sufficient to show that with respect to the private rights side of the equation, the burden on Lucas is considerably greater than that imposed on Mugler.

On the public interest side of the scale, the harm sought to be curtailed by the law in *Mugler* could be realized almost immediately upon the sale of the intoxicating beverage. In this case, on the other hand, no immediate harm or even foreseeable harm will be caused by Mr. Lucas building a home on his property. The harm caused to the beach is clearly remote and speculative and may even be able to be mitigated.[22]

The foregoing distinctions between *Mugler* and the instant case can be applied to virtually all the other so-called nuisance cases cited by the lower court. In all of them, the owner of the property can still retain the use his property for numerous other uses. Furthermore, the harm to the public occurs immediately by the operation of the offending activity, whether it be the operation of brickyard in the residential area (*Hadachek*), or almost immediately, such as the infected cedar trees that threatened more valuable apple orchards, *Miller v. Schoene*, 276 U.S. 272 (1928).

This Court's takings jurisprudence has always included a careful examination of the nature of the asserted right or interest invaded and a weighing of the public interest to

---

[22]As previously noted, the BMA envisions a "gradual retreat from the [beach/dune] system over a forty-year period. . . ." BMA, § 2(2). As has been aptly noted:

> the Act's forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the *Esposito* claimants' residences are not dire threats to public safety and welfare. A "public nuisance" ought to be abated, not phased out thrugh a half-lifetime of attribution.

Esposito v. South Carolina Coastal Council, 939 F.2d 165, 173 (4th Cir. 1991) (Hall, J., dissenting).

be protected. The lower court was derelict in thinking that there was a short-cut via a so-called "nuisance exception."

C. The Character of the Governmental Action In This Case Is Confiscatory In Nature Because It Effectively Ousts The Owner From His Property In A Way That Has Been Customarily Achieved Through Eminent Domain Proceedings.

As this Court has noted, another important factor to consider to determine whether a regulatory taking has occurred is the "character of the governmental action." *See Keystone*, 480 U.S. at 495 (1987). While the lower court noted that outright physical occupation of one's property satisfies this factor and is almost invariably determinative that a taking has occurred, 404 S.E.2d at 899 citing to *Loretto*, the court was wrong to think that the factor cannot be applied in land-use control cases such as this one where the law can be characterized as confiscatory.

At the far end of the spectrum is a physical invasion or confiscation of property for the benefit of the public. Such activities -- for example, the condemnation of property to build public roads or create parks -- clearly require compensation to be paid. The owner is ousted from his property.

The setback lines in the BMA similarly have the effect of ousting the owner from his property by extinguishing a fundamental attribute of ownership: the right reasonably to use the surface estate of one's own property. *See Agins*, 447 U.S. at 262, and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (both referring to fundamental rights tied to property ownership). As previously discussed, the right to build on one's own property is a basic common law right reserved to the people. *Bostock v. Sams*, 52 A. 665, 668 (Md. 1902). *See also Nollan*, 483 U.S. at 834 n.2 ("[T]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'").

In contrast to the interests at stake in many Supreme Court cases addressing regulatory takings, *e.g.*, *Penn Central* (air rights) and *Keystone* (support or mineral estate), the BMA destroys Lucas' basic right to use the surface estate by building homes thereon. The Supreme Court has never concluded, and we believe could not conclude under its own precedents, that all reasonable use of the surface estate may be completely denied without compensation. While *amici* believe that *Keystone* was wrongly decided, the instant case is clearly distinguishable from the situation in *Keystone* where the mine owners could not even demonstrate that a single mine of theirs could not be profitably operated, and where, at best, only two percent of their coal might be affected. 480 U.S. at 496 (1987).

On the other hand, the setback lines in the BMA indisputably destroyed all economically viable use of petitioner's land and, in effect, converted the parcel into a park for the benefit of the public. While the formation of such a park may well be in the public interest, the government cannot indirectly accomplish through regulation what it would otherwise do through condemnation. *See Nollan*, 483 U.S. at 834, 841-42 (requiring grant of an easement would be a taking; improperly conditioning a building permit on such a grant is also a taking), and *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978) (city could not preserve scenic easement through regulation rather than initial plan of acquisition).

Indeed, the purposes of the BMA are not all that dissimilar to the purposes of a floodplain ordinance declared invalid by a unanimous Supreme Court in *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.*, 193 A.2d 232 (N.J. 1963) in which an oft-cited passage from *Averne Bay Construction Co. v. Thatcher*, 15 N.E.2d at 592 (1938), was quoted to the effect that:

> An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.

Morris County, *supra*, 193 A.2d at 242 (1963)(emphasis in original).

As was the case with *Morris County*, most of the contemplated uses under the BMA are of a public or *quasi*-public nature, and it may be argued that the "prime object of the [BMA] regulations is to retain the land substantially in its natural state." 193 A.2d at 239. *Cf. McDougal v. County of Imperial*, 942 F.2d. 668 (9th Cir.1991)(owner deprived of economically viable use of property by floodplain designation states a claim for inverse condemnation).

Similarly, a unanimous New Hampshire Supreme Court in *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981) had no trouble finding that a zoning ordinance that placed a portion of the property owner's land in a undevelopable "conservation zone" constituted a taking. While that court cited to the usual balancing tests and the difficulty in some cases of deciding when a regulatory taking has occured, it easily concluded that the case before it "*does not lie anywhere near the line*" and held the ordinance to constitute a taking. *Id.* at 20 (emphasis added). Indeed, the *Burrows* Court went on to chastise public officials "who have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual," *id.* at 20, and that inverse condemnation awards, even for a temporary taking, for confiscatory regulations such as the one in that case should "encourage such officials *to stay well on the constitutional side of the line* [*citing San Diego Gas & Elec. Co. v. City of San Diego*, 101 S.Ct.at 1308, n.26 (Brennan, J., dissenting)] and should also *discourage harassment of property owners* by repeated

amendments of zoning regulations and the enactment of new ones." 432 A.2d at 20 (emphasis added).[23]

These sentiments by the New Hampshire Supreme Court echo Justice Holmes often quoted statement that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922). *Amici* submit that there is no meaningful distinction between the "conservation zones" in *Burrows* and *Morris County* and the beach/dune zone in the case at bar.

Not suprisingly, commentators and courts have agreed that the character of such a governmental action is confiscatory. *See* Rathkopf, 1 The Law of Zoning and Planning, §§ 6.07[6] at 6-48, 6-49 (1991), "Where land is zoned exclusively for public or quasi-public uses, such as a. . . park, public recreation area, or parking lot, courts are likely to hold the regulation confiscatory." (cases cited omitted). More pertinently, Rathkopf notes that

> a zoning or other type of land use regulation which totally prohibits any development or other reasonably beneficial use of the land is likely to be held confiscatory. For example, prohibiting all reasonable use by placing land in a conservation zone, preserving it as a wildlife refuge, or limiting its use to dune crossings and fences or to wooden walkways, wharfs, and duck blinds, will generally result in a finding of confiscation.

Id. § 6.07[7] at 6-51 (cases cited omitted).

---

[23] While the BMA was recently amended to allow special permits to be issued, and Mr. Lucas may ultimately be successful in obtaining them for both lots, he is nevertheless entitled to just compensation for the temporary taking during the years since the enactment of the BMA. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). If he is given a permit for only one lot, he is entitled to the temporary taking of the one, and a permanent taking of the other.

Viewed as a 100 percent set-back ordinance, the BMA would similarly not survive judicial scrutiny. *See, e.g., Hoshour v. County of Contra Costa*, 21 Cal. Rptr. 714 (1962)(set-back reducing the useful area of triangular corner lot to 10 square feet is confiscatory); *Faucher v. Sherwood*, 32 N.W.2d 440 (Mich. 1948) (40 foot setback requirement of property only 58 feet wide); *Nectow v. Cambridge*, 277 U.S. 183 (1928)(*Euclid*-type ordinance invalidated that left the landowner with a 100-foot-wide residential strip wedged between a soap factory and Ford assembly plant, thus destroying all of the property's value with no reciprocal benefit).

The "character of the government action" can also be gauged by comparing it to the customary way in which the government obtains similar public benefits. For example, government authorities normally do not use their powers of eminent domain to maintain a pillar of coal in the ground (*Keystone*) or preserve superjacent air space (*Penn Central*). Nor does the government usually purchase brickyards (*Hadachek*) or other such noisome concerns in order to cease the operations of same. On the other hand, all levels of government employ eminent domain to purchase and create open space and public parks.[24]

---

[24] Congress has explicitly provided for numerous funding mechanisms and State grant programs to acquire private lands to remain essentially in their natural state for the public benefit, be they wetlands, coastal areas, and other open space for parks, wildlife refuges, and the like. *See, e.g.*, Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3921-3923 (authorizing purchase of wetlands); The Recreation Use of Conservation Areas Act of 1962, as amended, 16 U.S.C. § 460K-1 (authorizes acquisition of areas adjacent to fish and wildlife areas for "protection of natural resources" and related "recreational development"); The Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601-4-11 (authorizing purchase of land, waters, or interests in them); The National Wildlife Refuge System Administration Act, 26 U.S.C. § 668dd-33 (requires payment of fair market value for any right-of-way easement or reservation granted within the Refuge System); The Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715 (authorizes Secretary of Interior to purchase migratory bird areas); Federal Land Policy and Management Act, 43 U.S.C. § 1748 (authorizes Secretary of Interior to purchase lands primarily of value for outdoor recreation purposes).

This Court should not allow South Carolina and other governmental bodies to conveniently avoid the customary route of compensating landowners whose property is put to public use. Indeed, it is only of recent vintage (and dwindling public fiscs) that governmental bodies have sought in the name of environmental protection to circumvent their eminent domain powers and take an individual's property via confiscatory regulations such as the one at bar. If South Carolina's argument prevails, one wonders whether it or any other level of government would ever pay private landowners to acquire wildlife refuges, wetlands, and parks, whether by the beach, in the suburbs, or in the middle of town.

Thus, the other two factors in *Connolly*, i.e, the extent to which a regulatory action interferes with the owner's investment-backed expectations and the economic impact on the property owner, are additional but not necessary criteria to determine if a taking occurred. A farmer, for example, may have a small parcel of land that lies fallow and thus may have no investment-backed expectations to use that portion of his property, nor would a loss of those few acres out of hundreds that he owns have any real economic impact on him. Nevertheless, a requirement that he keep those acres in a pristine state because they are wetlands or harbor endangered wildlife species rather than clear them for future farming use prevents him from ever making reasonable use of his property and is confiscatory by its very nature.

Similarly, the owner of a residential lot has the right to build and maintain his home on his property, a denial of which will constitute a taking even without a frustration of investment-backed expectations or a significant economic impact. In *Loretto*, the economic use of the apartment building could be maintained, or indeed, might even have been enhanced by the cable television wires affixed to the building, yet the property right invaded -- the right to exclude others-- was an important enough one to trump the alleged public benefits. The same right to exclude others was found paramount in *Kaiser*. And in *Moore v. City of East Cleveland*, the owner of the house could still live in it, was not frustrated by any investment-backed

expectations, nor experienced a decrease in the value of the house, but the zoning regulation infringed on an important right of the owner to decide whom she could live with, in that case her grandchildren, and thus was viewed as a taking of her property rights entitling her to just compensation. 431 U.S. at 513 (1977) (Stevens, J., concurring).

In the case at bar, the fundamental common law right is the enjoyment of the lateral use of the surface estate for the building of one's home. To be sure, in this case as in many others, the confiscatory nature of the regulation is compounded by the economic impact of the law and its frustration of the owner's investment backed expectations, but those economic criteria are not determinative.[25]

---

[25] Thus, the date the property is acquired as compared to the initiation of the regulatory program is irrelevant. In *Nollan*, this Court said:

> Nor are the Nollans' rights altered because they acquired the land well after the [Coastal] Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

483 U.S. at 834, n.2. Thus, Mr. Lucas could give or bequeth his property rights in the two lots to anyone he chooses. The recipient's property rights could not be diminished simply because the recipient had no investment-backed expectations having invested nothing in the lots. Nevertheless, the confiscatory nature of the regulation works a taking on the new owner justifying compensation based on the fair market value without the setback restrictions. Thus, even assuming that the new owner could, for example, charge beachgoers $50 a day for the right to use the property during the season or could use the property to rent beach umbrellas, and thus can be said to enjoy an economically viable use of the property, the BMA would nevertheless constitute a taking because it deprives the owner of the basic right to build a home on his property. Similarly, Mr. Lucas' rights in the property would be the same regardless of whether he had originally acquired the property as a gift, paid one dollar for it, or one million dollars.

CONCLUSION

The maxim that "a man's home is his castle" is one deeply embedded in our heritage. The State of South Carolina, however, believes that Mr. Lucas should be contented with making his castle out of sand. This Court should emphatically tell the government authorities otherwise.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

January 2, 1992